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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

STATES OF WISCONSIN, MINNESOTA, OHIO and PENNSYLVANIA, *Complainants,*

vs.

STATE OF ILLINOIS and the SANITARY DISTRICT OF CHICAGO, *Defendants.*

No. 2 Original.

STATE OF MICHIGAN, *Complainant,*

vs.

STATE OF ILLINOIS and the SANITARY DISTRICT OF CHICAGO, *Defendants.*

No. 3 Original.

STATE OF NEW YORK, *Complainant,*

vs.

STATE OF ILLINOIS and the SANITARY DISTRICT OF CHICAGO, *Defendants.*

No. 4 Original.

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY AS AMICUS CURIAE IN OPPOSITION TO AMENDED APPLICATION OF THE STATES OF WISCONSIN, MINNESOTA, OHIO, PENNSYLVANIA, MICHIGAN AND NEW YORK FOR A REOPENING AND AMENDMENT OF THE DECREE OF APRIL 21, 1930 AND FOR THE GRANTING OF FURTHER RELIEF.

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MOTION OF THE CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Chicago Association of Commerce and Industry, an Illinois not for profit corporation, hereby respectfully moves this Court for leave to file a brief, as *amicus curiae,* in opposition to the "Amended Application of the States of Wis-

consin, Minnesota, Ohio, Pennsylvania, Michigan, and New York for a Reopening and Amendment of the Decree of April 21, 1930 and the Granting of Further Relief," filed herein on November 3, 1958. If the argument contained in this brief (which is attached hereto) is accepted by the Court, it will finally dispose of this Amended Application.

The position taken in the brief is that the diversion of water from Lake Michigan at Chicago no longer presents a justiciable issue for this Court. Congress now has authorized diversion of 1,500 c.f.s. plus domestic pumpage for the specific purpose of navigation in the Illinois waterway. The Secretary of War has also issued a permit specifically authorizing this diversion. The Court, under its decisions, must give conclusive effect to this action. It is important that this issue be faced and decided at the outset.

It is believed that the brief to be filed by the named defendants will not discuss in full this argument. This conclusion is supported by the fact that in the instant case the named defendants did not fully develop this argument in the brief filed by them early in 1958, opposing the initial Application for reopening the decree. Since it is likely that the defendants will pursue much the same course in their brief in opposition to the Amended Application, it is believed that the brief which the Association is requesting to file as *amicus curiae* will contain a more complete presentation of the law on this crucial argument which, if accepted by the Court, would be dispositive of this Amended Application.

The interest of the Chicago Association of Commerce and Industry in the instant action arises from the fact that it functions as a chamber of commerce for the Chicago Metropolitan Area. It has a membership of over 6,000 firms and 10,000 individuals, engaged in industrial, commercial and professional activities in five northeastern Illinois counties

and also in the most highly industrialized county in the State of Indiana, which State is not a party to this action. Among its members are barge lines, steamship lines, terminal facility companies, and industries and businesses shipping and receiving shipments in interstate and foreign commerce by water through the inland waterways and the Great Lakes. Some of these members are neither citizens nor residents of the State of Illinois, but have an immediate practical interest in the disposition of this matter.

The members' interests are reflected in the activities of the Association. Its active divisions include the Divisions of World Trade, Industrial Development, Commercial Development, and Transportation (with its committees on Harbors and Waterways and the Calumet-Sag Channel). The Association and the industries and businesses it represents are thus vitally concerned with an immediate disposition of this matter.

A reference to a special Master as requested by complainants would produce a long period of uncertainty as to the usability of the Illinois waterway and sanitary conditions in the Port of Chicago as well as the purity of the water supply available from Lake Michigan. As to the Illinois waterway and the Port of Chicago, this is particularly critical since the St. Lawrence Seaway will open in April 1959. The Federal Government and other non-federal agencies are currently engaged in a project for improvement of navigation in the Waterway, known as the Calumet Sag Navigation Project, to be completed by 1963 at a cost exceeding two hundred million dollars. In excess of twenty-three million dollars, has also been spent by the Chicago Regional Port District to provide port facilities in Lake Calumet, located in the southern part of Chicago. Lake Calumet is now available and in use for many types of cargoes, particularly grain. It is the major terminus of

the Illinois and Mississippi Waterways on the Great Lakes. It is there that inland barges now, and to a greater extent in the future, will discharge their cargoes directly into oceangoing vessels.

Plans have been made or are being made by Association members and others to use these facilities. It is essential in such planning that there be full confidence in the availability of sufficient water to operate fully under proper conditions of navigability and sanitation for the full length of the Illinois waterway. Any element of substantial uncertainty, particularly if prolonged, will have an adverse effect on the use of the port and ultimately on shipping and toll revenues in the St. Lawrence Seaway. The Association itself (in 1959 sponsoring a large International Trade Fair in Chicago) will be hindered in carrying out its function of making the Port of Chicago and the Illinois waterway known to potential users all over the world.

In addition to the interest of its members as users of the waterways and as taxpayers, the Association has always demonstrated a vital concern for the general welfare and health (including the proper disposition of human and industrial waste) of the people in the area. It therefore is vitally concerned with the outcome of this case and desires to file the attached brief *amicus curiae*.

Consent to the filing of this brief has been obtained from complainant, State of Wisconsin, and defendants, State of Illinois and The Metropolitan Sanitary District of Greater Chicago (formerly Sanitary District of Chicago). The consent of all other complaining States has been requested. The States of Minnesota, Ohio, Pennsylvania and New York have so far failed to consent. The State of Michigan has the matter under active consideration. It is necessary that this motion be now filed, so as to comply with the

Rules and allow the required period of twenty days before the defendants' briefs are due (to wit, January 19, 1959) within which the other complaining States may file objections to the filing of this brief if they see fit. The Chicago Association of Commerce and Industry will timely advise the Court in proper form of the consent of the other complaining States, if that consent shall hereafter be obtained.

It is submitted that the issues now presented to this Court involve technical considerations of a nature more appropriate to the exercise of legislative power and administrative authority than to the judicial power. The Court has in reality recognized this a long time ago in suggesting that proposals for change in diversion should properly be addressed to Congress. These circumstances particularly indicate the wisdom of adhering to the principle of judicial non-interference with waters appropriated by Congress for navigational use, and make important an inquiry at the outset as to the propriety of granting any relief on complainants' Amended Application.

Respectfully submitted,

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INDEX TO BRIEF.

PAGE

Introductory Statement 2

Argument

I. Congress has authorized the present diversion including domestic pumpage 4

A. Directly, by the Rivers and Harbors Act of 1930 4

B. Indirectly, through issuance of a permit by the Secretary of War under the Rivers and Harbors Act of 1899 10

II. Congress acted within its lawful power in authorizing the present diversion including domestic pumpage 12

A. Congress has plenary power over navigation and navigable waters 12

B. The congressional authorization of the present diversion does not violate any provision of the United States Constitution 15

III. The Court has no authority to forbid or alter the diversion which Congress has validly authorized within its power over navigable water 18

Conclusion 24

APPENDICES.

A. Extract from Rivers and Harbors Act of July 3, 1930 .. 25

B. Extract from H. R. 11781, 71st Congress 26

C. Extract from Senate Report No. 715, 71st Congress, 2d Session, Calendar No. 722, page 3 27

D. Permit issued by the Secretary of War on June 26, 1930. 28

TABLE OF AUTHORITIES IN BRIEF.

Cases Cited.

Alabama Great Southern Railroad Co. v. United States, 340 U.S. 216 17

Arizona v. California, 283 U.S. 423 13

Bridge Co. v. United States, 105 U.S. 470 18

First Iowa Coop. v. Power Commission, 328 U.S. 152 13

Gilman v. Philadelphia, 3 Wall. 713 12

Louisiana Public Service Commission v. Texas & N. O. R. Co., 284 U.S. 125 17

Miller v. Mayor of New York, 109 U.S. 385 22

Monongahela Bridge Co. v. United States, 216 U.S. 177 .. 22

New Jersey v. New York, 283 U.S. 336 ..... 11, 22, 23

Oklahoma v. Atkinson Co., 313 U.S. 508 ..... 13, 19

Pennsylvania v. Wheeling and Belmont Bridge Company, 18 How. 421 ..... 16, 17, 20, 2

Sanitary District v. U.S., 266 U.S. 405 ..... 11, 13, 14, 1

South Carolina v. Georgia, 93 U.S. 4 ..... 13, 17

Southern Pacific Co. v. Olympian Co., 260 U.S. 205 22

United States v. Appalachian Power Co., 311 U.S. 377 ..... 12, 13

United States v. Chandler-Dunbar Co., 229 U.S. 53 19

United States v. Commodore Park, 324 U.S. 386 .....

United States v. Twin City Power Co., 350 U.S. 222 ..... 13, 20

Wisconsin v. Duluth, 96 U.S. 379 ..... 21, 22

Wisconsin v. Illinois, 278 U.S. 367 ..... 11, 14, 15, 1

Wisconsin v. Illinois, 281 U.S. 179 ..... 5, 13, 14, 1

Wisconsin v. Illinois, 281 U.S. 696 5

Wisconsin v. Illinois, 289 U.S. 395 ..... 9, 10

Page Tightly Bound

Statutes Cited.

Constitution of the United States, Article I, Section 9.....16

Rivers and Harbors Act of March 3, 1899 (c. 425, 30 Stat. 1151) 11

Rivers and Harbors Act of July 3, 1930 (c. 847, 46 Stat. 929). 4, 5

Other Authorities.

72 Cong. Rec. 11005, 11182..... 4, 6

House Document 184, 73d Congress, 2d Session..... 8

H. R. 11,781, 71st Congress..... 6

H. R. 3,300, 83d Congress..... 9

H. R. 3,210, 84th Congress..... 9

Letter of Deputy Attorney General Rogers of June 13, 1957. 15

Senate Report No. 715, 71st Congress, 2d Session, Calendar No. 722 7

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

INTRODUCTORY STATEMENT.

The diversion of water from Lake Michigan at Chicago no longer presents a justiciable issue for this Court. The situation has changed drastically since the time of the Court's decree in 1930. Congress now has authorized the diversion of 1,500 cubic feet per second plus domestic pumpages for the specific purpose of navigation in the Illinois Waterway. This diversion has also been authorized by the Secretary of War.

The 10,000 c.f.s. diversion existing in the 1920's was not authorized by Congress and not validly authorized by the Secretary of War. This Court, therefore, undertook to exercise its full equity powers in the matter. Today the purposes of the Court have been achieved. The necessary sanitary treatment works have been completed and diversion has been reduced to the amount specified in the 1930 decree.

Subsequent to the entry of the decree, Congress, not having acted on the matter theretofore, exercised its plenary power over navigable waters to create the Illinois Waterway and to appropriate the diverted water for navigation therein. In taking this action in the Rivers and Harbors Act of 1930, Congress was necessarily acting within its powers. It is evident from the Act and from earlier opinions and decree of this Court that the diversion in question relates to navigation and navigable waters and does not violate any constitutional or other right of the complaining states.

Also subsequent to entry of the decree, the Secretary of War, pursuant to the Rivers and Harbors Act of 1899, issued a permit also authorizing the diversion of 1,500 c.f.s. and domestic pumpage.

This Court has traditionally given well-nigh conclusive effect to the action of Congress over navigation and navigable waters, whether exercised directly, or indirectly, through

the Secretary of War. In such cases it limits its inquiry to whether Congressional action is related in some way to navigation and whether any constitutional prohibition is violated. In this particular situation, there is no occasion for the Court to review the congressional action even in such limited way. Not only is the diversion clearly a regulation of navigation under the Act, but also the Court has determined already in this particular case that the diversion in question is one which relates to navigation and does not violate any constitutional or other right of the complaining states. Thus, Congress having acted and its action being within its lawful authority, the Court under its decisions must give conclusive effect to the congressional action and refuse to grant any relief sought in the Amended Application. The Court cannot under its own holdings take away water which Congress has appropriated to the uses of navigation.

ARGUMENT.

I.

Congress Has Authorized the Present Diversion Including Domestic Pumpage.

A. Directly, By the Rivers and Harbors Act of 1930.

After the decree of this Court was entered on April 21, 1930, Congress exercised its plenary and paramount power over navigable waters to create the final link in and federalize a Waterway from Chicago to the Mississippi River and appropriated the diverted waters to maintain the navigable capacity thereof.

This congressional action was included in the Rivers and Harbors Act of July 3, 1930 (c. 847, 46 Stat. 929). (See Appendix A for pertinent extract.) The importance of this Act is revealed by the statement of Senator Joseph E. Ransdell of Louisiana on the floor of the Senate on June 17, 1930, a few minutes before the Act was approved:

> "It is the most important river and harbor bill ever presented to the American Congress, both in magnitude and number of projects included therein and the cost thereof . . .
>
> "When completed, these projects in the [Mississippi] valley, along with those already finished, will connect the entire Mississippi system with the Great Lakes and through the Erie Canal with the Atlantic coast, thereby joining in a connected whole practically all the rivers in the Republic east of the Rocky Mountains with the Atlantic Ocean and the innumerable waterways tributary thereto . . ." (72 Cong. Record 11182).

In appropriating the diverted water for use in this great project, Congress among other things provided in the 1930 Act:

> "That the water authorized at Lockport, Illinois, by the decree of the Supreme Court of the United States, rendered April 21, 1930 . . . [Wisconsin v. Illinois] . . . according to the opinion of the court . . . is hereby authorized to be used for the navigation of said waterway." (Appendix A).

The decree referred to authorized the diversion from Lake Michigan of (a) 1,500 c.f.s., and (b) the domestic pumpage on and after December 31, 1938 (281 U.S. 696). In the opinion referred to, the Court, as a basis for this authorization, said in part:

> "The master reports that . . . the interests of navigation in the Chicago River as a part of the port of Chicago will require the diversion of an annual average of from 1,000 c.f.s. to 1,500 c.f.s. in addition to domestic pumpage after the sewage treatment program has been carried out." (281 U.S. 179, 199).

By the 1930 Act Congress expressly appropriated "for the navigation" of the Illinois Waterway the effluent from the treated domestic pumpage plus the direct diversion of 1,500 c.f.s., previously authorized by the Court. It must be kept clearly in mind that the Illinois Waterway was not authorized by Congress until after entry of the decree of April 21, 1930. The potential navigation needs of the proposed Waterway were explicitly left out of consideration throughout the case and the Court's decree related only to the Chicago River and the Port of Chicago.

The legislative history of the 1930 Act demonstrates that Congress clearly intended to and did appropriate the domestic pumpage as well as the direct diversion of 1,500 c.f.s. to the necessities of navigation in the Waterway. Senator Blaine of Wisconsin who introduced the amendment which became the final law stated as follows on the floor of the Senate on June 17, 1930:

> "On December 31, 1938 the amount of water that would be going down this waterway without any con-

gressional action whatever would be 1,500 cubic feet seconds, in addition to the domestic pumpage; and this amendment permits identically that amount of water to flow down the canal and down this waterway.

"At the end of the year 1938, assuming that the accretion to the pumpage is 100 cubic feet seconds per year, then, the total amount that will be flowing down that waterway through the sluiceways, the dams and all of the physical construction will be 4,000 cubic feet seconds, guaranteed to the State of Illinois, guaranteed to the commerce of the United States, and that will continue to flow until there is a report made by the Chief of Engineers, whereupon, under this amendment, the Congress of the United States may determine the flow to be greater or less than that, subject to certain legal limitations which I do not at this time interject into this discussion." (72 Cong. Record 11005).

Furthermore certain changes made in the 1930 Act by Congress demonstrate that it did (a) expressly appropriate the diverted waters for use in the Illinois Waterway; (b) affirmatively authorize and require the direct diversion of 1,500 c.f.s. and the indirect diversion of the domestic pumpage; and (c) assume legislative control over future increases and decreases in diversion.

The Act as initially passed by the House of Representatives provided among other things that:

"Nothing in this Act shall be construed as authorizing any diversion of water from Lake Michigan, but the whole question of diversion from Lake Michigan shall remain and be unaffected hereby, as if this Act had not been passed." (H.R. 11,781, 71st Congress; see Appendix B).

This provision was stricken from the bill in the Senate. It substituted therefor the provision finally adopted, appropriating the water from Lake Michigan to the requirements of

the Waterway. This basic change clearly demonstrates that the effect of the 1930 Act as finally passed was to authorize and require the diversion in question.

The intention of Congress is further clarified by the rejection of an amendment proposed by the Senate Commerce Committee to the effect that the Secretary of War be given power in his discretion to determine the needs of the Waterway and to authorize the diversion required. This proposed amendment also included the following proviso:

> "Nothing in this Act shall prejudice any action at law or in equity respecting the diversion of water from the Great Lakes watershed." (Senate Report No. 715, 71st Congress, 2d Session, Calendar No. 722; see Appendix C).

By rejecting this proposal Congress refused to subordinate its action to the jurisdiction reserved by the Court. It also expressed its intention to withdraw from the Secretary of War the power he otherwise would have had to permit increases or decreases in the amount diverted.

In effect the House proposal was that the matter of diversion be left solely to the jurisdiction of the Court. The proposal of the Senate Commerce Committee was that Congress in effect recognize concurrent jurisdiction in the Court and in the Secretary of War. Both proposals were rejected. Congress expressly appropriated the water for use in the Waterway, thus authorizing and requiring the diversion. Congress thereby clearly indicated its intention to assert its full constitutional power to regulate and control all changes in this diversion, something it had not theretofore done.

Further demonstrating its intention to control future changes in diversion, and being in apparent doubt as to whether the amount appropriated was sufficient, Congress

in the Rivers and Harbors Act also called for a report from the Secretary of War as to the amount of water that would be required to meet the needs of a commercially useful waterway after the diversion was reduced and the works of the Sanitary District completed, "to the end that Congress may take such action as it may deem advisable."

In pursuance of that requirement the Secretary of War made the requested study and reported to Congress on December 7, 1933 (House Document No. 184, 73d Congress, 2d Session, pp. 4-7). He concluded that:

> "The report [of the Board of Engineers] conclusively shows that aside from sanitary requirements, the *minimum* annual average flow from Lake Michigan *required* to meet the needs of a commercially useful waterway in the Illinois River, is a direct diversion of 1,500 cubic feet per second in addition to domestic pumpage by the city of Chicago." (Emphasis added)

He went on further to state:

> "The River and Harbor Act of July 3, 1930 specifically authorizes the water within the limitation of the decree for the use of navigation on the Illinois Waterway."

In the light of his study he concluded:

> "Until the need is established for a greater diversion than that now provided by law, I see no reason for a modification of the present legislation."
>
> * * * * *
>
> "I therefore recommend that no change be made for the time being in the water authorized to be used for the navigation of the Illinois River under the provisions of the River and Harbor Act approved July 3, 1930 . . ."

In addition the Secretary of War advised Congress that in order to carry out its intention, expressed in the 1930 Act,

to develop a commercially useful Waterway using a minimum amount of water, certain additional locks and dams not previously authorized would have to be completed prior to December 31, 1938. Thereafter Congress, relying on the availability of the 1,500 c.f.s. plus domestic pumpage, and impliedly reaffirming the appropriation of it for use in the Waterway, authorized the expenditure of millions of dollars for construction of the elaborate locks and dams required to complete its program.

Congressional consideration of this diversion and of the Waterway program has continued up to the present time. Congress has provided for a wide range of additional improvements in the Illinois Waterway system in order to complete the integration at Chicago of the Inland Waterway system in the Mississippi Valley with the Great Lakes and the St. Lawrence Seaway. Congress has also given further specific consideration to diversion. Two bills (H.R. 3300, 83d Congress and H.R. 3210, 84th Congress) were passed authorizing temporary *increases* of diversion on an experimental basis to permit the United States Engineers and the Department of Health and Welfare to study the effect of such an increase on conditions in the Waterway. Both of these bills were vetoed by the President but in the 85th Congress a similar bill was passed by the House. The Senate adjourned before action was taken.

By and through the legislative action above described Congress has established the existing rate of diversion and has assumed control over any changes to be made in its amount. An order of this Court to reduce that diversion would conflict directly with the plenary and paramount power which Congress has exercised over the subject.

There is nothing in the decision of this court in the 1933 case (reported at 289 U.S. 395) which is inconsistent with

this interpretation of the Congressional action. The Court there merely held that the 1930 Rivers and Harbors Act does not determine or enact anything "in any way conflicting with the terms of the decree." The defendants had argued that they, because of the enactment of the 1930 Act, were not any longer required to comply with the decree with regard to the time schedule for completing the necessary controlling works and sewage treatment plants and reducing the direct diversion. In rejecting this argument the Court quite properly pointed out "so far as the Congress purports to authorize a diversion of water from Lake Michigan for the navigation of the waterway the authorization is explicitly limited to the amount allowed by the court's decree." (p. 403) There was in that case no issue as to the right of the Court to reduce the diversion already established as lawful by the Court and thereafter by Congress. This decision, moreover, was rendered before the Secretary of War made his 1933 report to Congress pursuant to the 1930 Act.

B. Indirectly, Through Issuance Of a Permit By The Secretary of War Under The Rivers And Harbors Act of 1899.

Not only has the Congress directly authorized this diversion through the 1930 Act, it has also indirectly authorized it through the permit issued by the Secretary of War on June 26, 1930, approximately two months after the entry of the decree and one week before the enactment of the 1930 Act. A copy of this permit is attached hereto as Appendix D.

By its terms this permit authorized the Sanitary District "to divert through its main drainage canal and auxiliary channel, waters from Lake Michigan, as specified in said decree." It thus refers only to the Chicago River and the Port of Chicago as did the decree of this Court. It is also similar to the decree in that it authorized the diversion of both the domestic pumpage and direct diversion of 1,500 c.f.s. on and after December 31, 1938.

This permit was issued by the Secretary of War under the authority delegated to him by Section 10 of the Rivers and Harbors Act of March 3, 1899. (30 Stat. 1121, 1151, 33 U.S.C.A. § 403.) This Court on a number of occasions has held that Section 10 properly authorized the Secretary of War to permit diversion of water from the navigable waters of the United States (see *Sanitary District* v. *United States,* 266 U.S. 405 (1925); *Wisconsin* v. *Illinois,* 278 U.S. 367 (1929); and also *New Jersey* v. *New York,* 283 U.S. 336 (1931)). Furthermore the opinion of this Court in this case published at 278 U.S. 367 affirmatively supports a permit by the Secretary of War limited to authorization of the diversion of domestic pumpage, plus 1,500 c.f.s. for navigation purposes.

The permit as issued imposes certain conditions not found in the Court's decree, including a declaration that the permit is "revocable at the will of the Secretary of War, and is subject to such action as may be taken by Congress." There is no reference to any power in the Court to modify the permit.

This permit constituted an independent and affirmative authority to the Sanitary District to divert 1,500 c.f.s. plus domestic pumpage from Lake Michigan into the Chicago River on and after December 31, 1938. It thereby plainly supersedes the decree in so far as the decree may have reserved jurisdiction in the Court to later reduce the diversion authorized.

II.

Congress Acted Within Its Lawful Power in Authorizing the Present Diversion Including Domestic Pumpage.

A. Congress Has Plenary Power Over Navigation and Navigable Waters.

The broad scope of Congressional power over navigable waters has been recognized by the Court since the early case of *Gilman* v. *Philadelphia,* 3 Wall. 713 decided in 1865. The historical development of the law as to congressional authority in this regard has been reviewed and the law clearly stated by the Court in *U. S.* v. *Appalachian Power Co.,* 311 U.S. 377 (1940). There forty-one states attacked the power of Congress to impose conditions unrelated to navigation in granting authority for hydro-electric power development. The Court there said:

> "The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. 'The Congress shall have Power. . . . To regulate Commerce . . . among the several States.' It was held early in our history that the power to regulate commerce necessarily included power over navigation." (p. 404)

But the Court went further to emphasize the breadth of this control and to point out that it was not limited solely to regulation imposed for pure navigational purposes. The Court stated as follows:

> "In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood

> protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce controls. . . . That authority [the authority of the Government over the stream] is as broad as the needs of commerce. . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government." (pp. 426-427)

This power of Congress over navigable waters includes the power to authorize the diversion of water from one watershed to another and to benefit navigation in one area to the detriment of navigation in another area. See *First Iowa Coop.* v. *Power Commission,* 328 U.S. 152 (1946); and *U. S.* v. *Commodore Park,* 324 U.S. 386 (1945) where the Court stated at page 393: "There is power to block navigation at one place to foster it at another." To similar effect see *South Carolina* v. *Georgia,* 93 U.S. 4 (1876).

As to the plenary power of Congress over matters bearing a relationship, even remote, to navigable waters, see the following cases: *Oklahoma* v. *Atkinson Co.,* 313 U.S. 508 (1941); *United States* v. *Twin City Power Co.,* 350 U.S. 222 (1956), *reh. denied* 350 U.S. 1009 (1956); *Arizona* v. *California,* 283 U.S. 423 (1931).

Even more compelling authority is found in the early opinions in *Wisconsin* v. *Illinois* and in *Sanitary District* v. *U.S.,* 266 U.S. 405 (1925), both specifically dealing with the diversion from Lake Michigan at Chicago. Throughout both those actions this Court has recognized the authority of Congress over the diversion of water from Lake Michigan. In *Wisconsin* v. *Illinois,* 281 U.S. 179 (1930) the Court referred explicitly to the authority of Congress and said:

> "These requirements as between the parties are the constitutional right of those States, *subject to whatever modification they hereafter may be subjected to*

by Congress acting within its authority." (p. 197) (Emphasis added)

"The right of the complainants to a decree is not affected by the possibility that Congress may take some action in the matter." (pp. 197-8)

"All action of the parties and the Court in this case will be subject, of course, *to any order that Congress may make* in pursuance of its constitutional powers and any modifications that necessity may show should be made by this Court." (pp. 198-9) (Emphasis added)

"The amount of water ultimately to be withdrawn *unless Congress may prescribe a different measure* is relatively small." (p. 200) (Emphasis added)

When the cause came before the Court upon the Master's initial Report, the Mississippi River states of Missouri, Kentucky, Tennessee, Louisiana, Mississippi and Arkansas intervened, supporting an 8,500 c.f.s. diversion as an aid to navigation and interstate commerce in the Mississippi Valley. But the Court (*Wisconsin* v. *Illinois*, 278 U.S. 367 (1929)) overruled their motions to dismiss the bills, again referring to the absence of congressional action in saying:

"In our view of the [8,500 c.f.s.] permit of March 3, 1925, *and in the absence of direct authority from Congress for a waterway from Lake Michigan to the Mississippi*, they show no rightful interest in the maintenance of that diversion." (p. 420) (Emphasis added)

Of course, at the time of the above decision, the Illinois Waterway had not been authorized by Congress.

In the earliest of the lake level cases, *Sanitary District* v. *United States*, 266 U.S. 405 (1925), the Mississippi Valley States of Missouri, Tennessee and Louisiana filed briefs as *amici curiae* supporting a diversion in excess of the 4,167 c.f.s. then authorized by the permit of the Secretary

of War. The Court refused to acknowledge their interest and suggested another approach:

> "The interest that the river states have in increasing the artificial flow from Lake Michigan is not a right, but merely a *consideration that they may address to Congress,* if they see fit, to induce a modification of the law [Act of March 3, 1899] that now forbids the increase unless approved as prescribed." (p. 431) (Emphasis added)

In 1957 the United States Attorney General rendered an opinion that a 1,000 c.f.s. temporary *increase* under H. R. 2 and S. 1123 (85th Congress) would be within the proper powers of Congress (Letter of June 13, 1957 from Deputy Attorney General Rogers to the Director of the Bureau of the Budget). Surely, if Congress has authority to temporarily increase Chicago diversion from 1,500 c.f.s. to 2,500 c.f.s, in addition to domestic pumpage, its authority to grant the existing 1,500 c.f.s plus domestic pumpage, is beyond question.

B. The Congressional Authorization of the Present Diversion Does Not Violate any Provision of the United States Constitution.

With particular force, the early decisions in *Wisconsin v. Illinois* reported in 278 U.S. 367 (1929) and 281 U.S. 179 (1930) reject any contention that there are any positive limitations in the United States Constitution, incorporated in the Fifth Amendment or elsewhere, which prohibit a diversion from Lake Michigan at Chicago of 1,500 c.f.s. plus domestic pumpage. By authorizing such diversion in its opinion and decree the Court impliedly ruled that there was no constitutional impediment to its so doing. This ruling applies with equal force to any other branch or agency of the United States Government acting within its delegated powers. As we have shown above, Congress

clearly has been delegated the power to authorize this diversion. It has done so. It cannot be held thereby to have violated in any way the constitutional rights of the complainants in this action.

Complainants have argued in the Congress and before this Court that any action by it authorizing diversion would violate Clause 6 of Section 9 of Article I of the Constitution which in pertinent part reads as follows:

> "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another. . . ."

The Court found it unnecessary to rule on the point in *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929). That there is no substance in this contention is made clear by the decisions of this Court from as early as 1856. In that year, the Court decided *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421, in which the complainants charged that the construction of a particular bridge would so interrupt navigation and inhibit commerce on the river as to constitute giving a preference to one port over another. The Court rejected this contention:

> "There are many acts of congress passed in the exercise of this power to regulate commerce, providing for a special advantage to the port or ports of one State, and which very advantage may incidentally operate to the prejudice of the ports in a neighboring State, which have never been supposed to conflict with this limitation upon its power. The improvement of rivers and harbors, the erection of lighthouses, and other facilities of commerce, may be referred to as examples. It will not do to say that the exercise of an admitted power of congress conferred by the constitution is to be withheld, if it appears, or can be shown, that the effect and operation of the law may incidentally extend beyond the limitation of the power.

> Upon any such interpretation, the principal object of the framers of the instrument in conferring the power would be sacrificed to the subordinate consequences resulting from its exercise. These consequences and incidents are very proper considerations to be urged upon congress for the purpose of dissuading that body from its exercise, but afford no ground for denying the power itself, or the right to exercise it." (pp. 433-434)

This was further confirmed in *South Carolina* v. *Georgia,* 93 U.S. 4, 12-13 (1876). That case involved a diversion, carried out by the Secretary of War under the authorization of Congress, of water from the north channel of the Savannah River to the south channel, for the benefit of the port of Savannah, Georgia. South Carolina attacked this diversion as an unconstitutional preference. The Court rejected the argument on the authority of *Pennsylvania* v. *Wheeling, supra.*

More recently, in its opinion in *Alabama Great Southern Railroad Co.* v. *United States,* 340 U.S. 216, 229 (1951) the Court rejected the argument that a particular rate schedule adopted by the Interstate Commerce Commission constituted an invalid preference, although conceding that commercial interests using the Port of New Orleans would be comparatively benefited. The Court relied on *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.,* 284 U.S. 125 (1931) where it stated as follows:

> "The specified limitations on the power of Congress were set to prevent preference as between States in respect of their ports or the entry and clearance of vessels. It does not forbid such discriminations as between ports. Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States." (p. 131)

Any other construction of this provision would mean that Congress could not create the St. Lawrence Seaway because that might divert traffic from New York and Baltimore to Cleveland, Milwaukee and Chicago, and that Congress could not improve the Mississippi at New Orleans because that would be a preference over other ports not simultaneously improved to the same extent. A century and a half of history demonstrates that the constitutional provision has no such meaning.

It is apparent from the discussion in Point II of this Brief that Congress has an unquestionable power to regulate diversion from Lake Michigan to the Illinois Waterway, for navigation purposes, for a combination of navigation and sanitation purposes, and for sanitation purposes having only incidental relationship to navigation. Regardless of that, by the Rivers and Harbors Act of 1930 congressional power was exercised for navigation purposes solely. There can be no question that the diversion authorized in that Act is valid. Also valid and still in force is the permit issued by the Secretary of War on June 26, 1930.

III.

This Court Has No Authority to Forbid or Alter the Diversion Which Congress Has Validly Authorized Within Its Power Over Navigable Waters.

Upon judicial determination that Congress has exercised its power in respect to navigation or navigable waters and that such action is within the constitutional authority of Congress, the Court has no further power or authority to interfere with, alter or reverse the legislative determination. As this Court has stated in *Bridge Co.* v. *United States,* 105 U.S. 470, 482 (1881): "It would be an abuse of judicial power for the courts to attempt to interfere . . ." Further in

United States v. *Chandler-Dunbar Co.*, 229 U.S. 53, 64, 66 (1913) the Court said, "So unfettered is this control of Congress . . . that its judgment . . . is conclusive . . . [there is] no room for a judicial review."

These principles of law have been clearly established by this Court and followed with consistency over the years. There is no basis, under circumstances existing today and in view of specific congressional authorization of the diversion now attacked, for departing from them in considering complainants' Amended Application.

A clear statement of the rule adopted by the Court is contained in *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508 (1941). Oklahoma complained of a proposed diversion of water from the Red River in connection with the proposed Dennison dam and reservoir. Oklahoma alleged that while the work and diversion would benefit Texas, it would seriously injure Oklahoma, partially obliterating the state boundary, displacing population, interfering with oil and gas exploration, reducing tax revenues, and appropriating state-owned land. The Court refused to interfere with this congressionally sponsored project, saying:

> "Such matters raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. *They are therefore questions for the Congress, not the courts.* For us to inquire whether this reservoir will effect a substantial reduction in the lower Mississippi floods *would be to exercise a legislative judgment* based on a complexity of engineering data. *It is for Congress alone to decide* whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. *That determination is legislative in character.*" (p. 527) (Emphasis added)

More recently, in *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956), *reh. denied* 350 U.S. 1009 (1956), after observing that Congress had approved the plan "for flood control and other purposes," the Court summed up the power of Congress over navigation and the role of the Court with regard thereto in the following terms:

> "*It is not for courts, however, to substitute their judgments for congressional decisions* on what is or is not necessary for the improvement or protection of navigation. See *State of Arizona* v. *California*, 283 U.S. 423, 455-457. The role of the judiciary in reviewing the legislative judgment is a narrow one in any case. See *Berman* v. *Parker*, 348 U.S. 26, 32; *United States ex rel. Tennessee Valley Authority* v. *Welch*, 327 U.S. 546, 552. The decision of Congress that this project will serve the interests of navigation involves engineering and policy *considerations for Congress and Congress alone to evaluate.* Courts should respect that decision until and unless it is shown 'to involve an impossibility,' as Mr. Justice Holmes expressed it in *Old Dominion Co.* v. *United States*, 269 U.S. 55, 66. If the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced." (p. 224) (Emphasis added)

The well-known case, *Pennsylvania* v. *Wheeling and Belmont Bridge Company*, 18 How. 421 (1856), an original action, illustrates the prompt judicial recognition of action by Congress. After a decree finding that a bridge over the Ohio River was an obstruction to navigation and a nuisance, but before the decree was executed, Congress declared the bridge a lawful structure and not an obstruction. The Court refused to issue a mandate carrying into effect its own decree, saying:

> "Although it still may be an obstruction in fact, it is not so in contemplation of law." (p. 430)

Although it was argued that the Act of Congress could not

annul a judgment of the Court already entered, the Court said:

> "If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court no longer can be enforced." (p. 431)

Another case defining the limit of the Court's power is *Wisconsin* v. *Duluth*, 96 U.S. 379 (1877), an original action. The city of Duluth, Minnesota (with congressional approval and appropriations, and under federal supervision) had diverted the waters of the St. Louis River, forming the interstate boundary, by digging a canal across Minnesota Point for the benefit of Duluth Harbor. Wisconsin sought mandatory relief, but the Court refused to act, saying:

> "It cannot be necessary to say that when a public work of this character has been inaugurated or adopted by Congress, and its management placed under the control of its officers, *there exists no right in any other branch of the government to forbid the work, or to prescribe the manner in which it shall be conducted.*" (p. 383) (Emphasis added)

After describing the action of Congress in several rivers and harbors bills, the Court continued:

> "Nor can there be any doubt that such action is within the constitutional power of Congress. . . . If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, *this court can have no lawful authority to forbid the work.* . . .
>
> "When Congress appropriates $10,000 to improve, protect and secure this canal, *this court can have no power to require it to be filled up and obstructed.* While the engineering officers of the government are, under the authority of Congress, doing all they can to make

> this canal useful to commerce, and to keep it in good condition, this court can owe no duty to a State which requires it to order the City of Duluth to destroy it." (pp. 387-388) (Emphasis added)

The rule of judicial non-interference is the same whether Congress acts directly, as above stated, or indirectly, through the Secretary of War. In *Monongahela Bridge Co.* v. *United States,* 216 U.S. 177, 195 (1910) the Court said:

> "It was not for the jury to weigh the evidence and determine, according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secretary. That was immaterial; *for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject.* It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. *Its action in the premises cannot be revised or ignored by the courts or by juries. . . .*" (Emphasis added)

See also *Miller* v. *Mayor of New York,* 109 U.S. 385 (1883) and *Southern Pacific Co.* v. *Olympian Co.,* 260 U.S. 205 (1922).

In *New Jersey* v. *New York,* 283 U.S. 336 (1931) the Court in entering its final decree authorizing a 440 million gallon daily diversion by New York, clearly recognized that its decision was subject to the paramount authority of Congress, delegated by statute to the Secretary of War. In its opinion it cautioned New York as follows:

> "Of course in that particular as in some others New York takes the risk of the future. If the War Depart-

ment should in future change its present disinclination to interfere, New York would have to yield to its decision. . . . This will be provided for in the decree." (p. 344)

The decree did in fact provide for future congressional and executive action as follows:

"This decree is without prejudice to the United States and particularly is subject to the paramount authority of Congress in respect to navigation and navigable waters of the United States, and subject to the powers of the Secretary of War and Chief of Engineers of the United States Army in respect to navigation and navigable waters of the United States." (p. 348)

Many of the above cases state emphatically that congressional regulation of navigation and its determination as to what is a proper benefit to one area as against another is well-nigh conclusive. As Justice Holmes stated, the Court will not interfere unless it "involves an impossibility". If it be argued that these cases allow the Court power to determine whether action is arbitrary and capricious and a violation of constitutional rights, it is sufficient answer to say that so far as this particular diversion case is concerned, these issues were laid to rest adversely to the complaining states by the decisions of this Court in this case in 1929 and 1930. If there was no constitutional objection to the use of 1,500 c.f.s. and domestic pumpage for navigational purposes in the Port of Chicago, *a fortiori,* there can be no constitutional objection to the use of such waters in the entire waterway including the Port of Chicago and running to the Mississippi River. By recognizing that this water was needed for navigational purposes in the Port of Chicago, the Court in effect ruled that this diversion was within the power of Congress to authorize if it should see fit to do so. This Congress has now done. There

is no such legal or practical necessity as to confer on the Court the power to hear and determine judicially what has already been conclusively determined by the legislative branch.

CONCLUSION.

In conclusion The Chicago Association of Commerce and Industry, as *amicus curiae,* urges the Court to enter an order denying and dismissing the Amended Application of the states of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan and New York for a reopening and amendment of the decree of April 21, 1930 and for the granting of further relief, on the ground that said Amended Application does not present an issue of which the Court can take judicial cognizance.

Respectfully submitted,

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APPENDIX A.

Extract from Rivers and Harbors Act of July 3, 1930
(c. 847, 46 Stat. 929)

"Illinois River, Illinois, in accordance with the report of the Chief of Engineers, submitted in Senate Document Numbered 126, Seventy-first Congress, second session, and subject to the conditions set forth in his report in said document, but the said project shall be so constructed as to require the smallest flow of water with which said project can be practically accomplished, in the development of a commercially useful waterway: Provided, That there is hereby authorized to be appropriated for this project a sum not to exceed $7,500,000: Provided further, That the water authorized at Lockport, Illinois, by the decree of the Supreme Court of the United States, rendered April 21, 1930, and reported in volume 281, United States Reports, in Cases Numbered 7, 11, and 12 Original—October term, 1929, of Wisconsin and others against Illinois, and others, and Michigan against Illinois and others, and New York against Illinois and others, according to the opinion of the court in the cases reported as Wisconsin against Illinois, in volume 281, United States, page 179, is hereby authorized to be used for the navigation of said waterway; Provided further, That as soon as practicable after the Illinois waterway shall have been completed in accordance with this Act, the Secretary of War shall cause a study of the amount of water that will be required as an annual average flow to meet the needs of a commercially useful waterway as defined in said Senate document, and shall, on or before January 31, 1938, report to the Congress the results of such study with his recommendations as to the minimum amount of such flow that will be required annually to meet the needs of such waterway and that will not substantially injure the existing navigation on the Great Lakes to the end that Congress may take such action as it may deem advisable."

APPENDIX B.

Extract from H.R. 11781, 71st Congress.

"Illinois River, Ill., in accordance with the report of Maj. Gen. Lytle Brown, Chief of Engineers, submitted in Senate Document No. 126, Seventy-first Congress, second session, and subject to the conditions set forth in his report in said document, except that the State of Illinois' plans of improvement are not adopted as to the volume or so as to require the volume of water contemplated in said plans, but the said project shall be so constructed as to require the smallest flow of water with which said project can be practically accomplished, in the development of a commercially useful waterway: *Provided,* That nothing in this act shall be construed as authorizing any diversion of water from Lake Michigan, but the whole question of diversion from Lake Michigan shall remain and be unaffected hereby, as if this act had not passed: *Provided further,* That there is hereby authorized to be appropriated for this project a sum not to exceed $7,500,000."

APPENDIX C.

Extract from Senate Report No. 715, 71st Congress, 2d Session, Calendar No. 722, page 3.

"Page 31, line 16, after the word 'document,' strike out remainder of page and page 32, line 1, ending with the word 'passed,' and insert in lieu thereof a colon and the following:

"*Provided,* That the diversion of water from Lake Michigan shall be so controlled by the Secretary of War under the supervision of the Chief of Engineers, as to meet the needs of a commercially useful waterway as defined in said Senate document, from Lake Michigan to the Mississippi River and to conserve fully existing interests of navigation on the Great Lakes: *Provided,* that nothing in this act shall prejudice an action at law or any equity respecting the diversion of water from the Great Lakes watershed."

If adopted, this amendment would have resulted in the pertinent provision of the Rivers and Harbors Act of 1930 reading as follows:

"Illinois River, Ill., in accordance with the report of Maj. Gen. Lytle Brown, Chief of Engineers, submitted in Senate Document No. 126, Seventy-first Congress, second session, and subject to the conditions set forth in his report in said document: *Provided,* That the diversion of water from Lake Michigan shall be so controlled by the Secretary of War, under the supervision of the Chief of Engineers, as to meet the needs of a commercially useful waterway, as defined in said Senate document, from Lake Michigan to the Mississippi River and to conserve fully existing interests of navigation on the Great Lakes: *Provided,* That nothing in this act shall prejudice any action at law or in equity respecting the diversion of water from the Great Lakes watershed: *Provided further,* That there is hereby authorized to be appropriated for this project a sum not to exceed $7,500,000."

APPENDIX D.

Permit issued by the Secretary of War on June 26, 1930

WAR DEPARTMENT.

NOTE.—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges, and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State assent to the work authorized. IT MERELY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION. (See Cummings v. Chicago, 188 U.S. 410.)

PERMIT.

WHEREAS, by Section 10 of an act of Congress approved March 3, 1899, entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," it is provided that it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same;

AND WHEREAS, The Sanitary District of Chicago, Illinois, was granted authority by the Secretary of War by an instrument dated December 31, 1929, to divert water through its main drainage canal and auxiliary channels from Lake Michigan, the said authority if not previously revoked or specifically extended to cease and be null and void on the effective date of the decree to be entered by the Supreme Court of the United States in the case of the State of Wisconsin, et al. versus the State of Illinois and Sanitary District of Chicago;

AND WHEREAS, On April 21, 1930, the Supreme Court of the United States entered a decree enjoining the State of Illinois and the Sanitary District of Chicago from diverting any of the waters of the Great Lakes-St. Lawrence System or Watershed excepting as specified in the said decree, a copy of which is hereto attached and made a part of this instrument;

AND WHEREAS, The said Sanitary District has applied for a continuation of authority to divert water from Lake Michigan:

NOW, THEREFORE, this is to certify that upon the recommendation of the Chief of Engineers, the Secretary of War under the provisions of the aforesaid statute, and subject to the following conditions, hereby authorizes the said Sanitary District of Chicago to divert through its main drainage canal and auxiliary channels, waters from Lake Michigan, as specified in the said decree.

The conditions to which the said diversions shall be subject are as follows:

1. That there shall be no unreasonable interference with navigation by the work herein authorized.

2. That if inspections or any other operations by the United States are necessary in the interests of navigation, all expenses connected therewith shall be borne by the permittee.

3. That no attempt shall be made by the said permittee

to forbid the full and free use by the public of any navigable waters of the United States.

4. That action taken by the said Sanitary District for the reduction of sewage discharge into the said Chicago River shall be under the supervision of the United States District Engineer at Chicago, and the said diversion of water from Lake Michigan hereby authorized, shall also be under his supervision, and under his direct control in time of flood on the Illinois and Des Plaines rivers.

5. That this permit is revocable at the will of the Secretary of War, and is subject to such action as may be taken by Congress.

Witness my hand this 25th day of June, 1930.

LYTLE BROWN, Major General,
Chief of Engineers.

Witness my hand this 26th day of June, 1930.

PATRICK J. HURLEY,
Secretary of War.